

[6450-01-P]

DEPARTMENT OF ENERGY

[Case Number 2018-001]

Energy Conservation Program: Notice of Decision and Order Denying an Exemption to Aero-Tech Light Bulb Co. from the Department of Energy Rough Service Lamps Energy Conservation Standards

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of decision and order.

SUMMARY: The U.S. Department of Energy (DOE) gives notice of a Decision and Order (Case Number 2018-001) that denies Aero-Tech Light Bulb Co.'s (Aero-Tech) application for a two-year small business exemption from compliance with the DOE rough service lamp energy conservation standards.

DATES: The Decision and Order is effective on January 17, 2019.

ADDRESSES: The docket, which includes *Federal Register* notices, comments, and other supporting documents/materials, is available for review at <https://www.regulations.gov>. All documents in the docket are listed in the <https://www.regulations.gov> index. However, some

documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at <http://www.regulations.gov/docket?D=EERE-2018-BT-PET-0016>. The docket web page contains simple instruction on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Dr. Stephanie Johnson, U.S. Department of Energy, Building Technologies Program, Mailstop EE-2J, 1000 Independence Avenue, SW., Washington, DC 20585-0121. Telephone: (202) 287-1943. E-mail: AeroTech2018PET0016@ee.doe.gov.

Ms. Celia Sher, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC-33, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585-0103. Telephone: (202) 287-6122. E-mail: Celia.Sher@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On December 26, 2017, DOE issued a final rule codifying at 10 CFR 430.32(bb) statutory backstop requirements applicable to rough service lamps and vibration service lamps. Prior to the rule, these backstop requirements were triggered as a result of rough and vibration service lamps exceeding a previously announced sales threshold and in the absence of any other energy conservation regulation issued by DOE for these lamps. In particular, the final rule

applies a statutorily established 40-watt maximum energy use and packaging limitation to rough and vibration service lamps manufactured on or after January 25, 2018. 82 FR 60845.

On May 23, 2018, Aero-Tech submitted an application, pursuant to Subpart E of 10 CFR part 430, requesting a two-year small business exemption from the DOE rough service lamps energy conservation standards found in 10 CFR 430.32(bb). Aero-Tech requested an exemption from the standards on the basis of its status as a small business. According to Aero-Tech, failure to receive a small business exemption would likely result in a lessening of competition in the market for lighting companies.

Under 42 U.S.C. 6295(t), DOE may grant to a manufacturer a temporary exemption from an applicable energy conservation standard if DOE finds that the annual gross revenues of such manufacturer from all its operations (including the manufacture and sale of covered products) does not exceed \$8,000,000 for the 12-month period preceding the date of the application. In making this finding, DOE must account for the annual gross revenues of any other person who controls, is controlled by, or is under common control with, such manufacturer. (42 U.S.C. 6295(t)(1)) The Secretary of Energy (Secretary) may not grant an exemption with respect to any type (or class) of covered product subject to an energy conservation standard unless the Secretary finds, after obtaining the written views of the Attorney General, that a failure to allow an exemption would likely result in a lessening of competition. (42 U.S.C. 6295(t)(2)) *See also*, subpart E of 10 CFR part 430. A notice of the decision of the Secretary must be published in the *Federal Register* along with the reason for denying or granting the application. 10 CFR 430.56(c)

On October 15, 2018, DOE issued a notice announcing the receipt of and publishing Aero-Tech's application for exemption. 83 FR 51931. In accordance with its regulations, DOE

also transmitted Aero-Tech's application for exemption to the Attorney General by the Secretary along with: (a) A statement of the facts and of the reasons for the exemption, and (b) copies of all documents submitted. 10 CFR 430.54. DOE received one comment submitted by the National Electrical Manufacturers Association (NEMA) which provided data and supporting factual information relating to rough service lamp sales. NEMA did not take a position on the merits of Aero-Tech's application.¹

II. Final Denial

In accordance with Title 10 of the Code of Federal Regulations (10 CFR 430.56(c)), DOE gives notice of the issuance of its decision and order denying Aero-Tech's application for a small business exemption. The final decision document setting forth the relevant facts and the legal basis for denying Aero-Tech's application is available in the docket referenced above (<http://www.regulations.gov/docket?D=EERE-2018-BT-PET-0016>). In evaluating this matter, DOE's primary consideration was whether a failure to allow the exemption would result in a lessening of competition. After consultation with the Attorney General, DOE does not believe Aero-Tech has demonstrated that this would be the case. In its assessment letter responding to

¹ NEMA's comment can be accessed at: <https://www.regulations.gov/document?D=EERE-2018-BT-PET-0016-0002>

DOE, the Department of Justice (DOJ) concluded that failure to grant Aero-Tech's application for a small business exemption for rough service lamps would likely not result in a lessening of competition. DOJ made this determination after reviewing Aero-Tech's application, as well as speaking with industry representatives and reviewing the supplementary information submitted to DOE by industry representatives. As part of its analysis, DOJ noted that it applies the standard set forth in 42 U.S.C. 6295(t)(2), and examines whether failure to grant a small business exemption would likely result in a lessening of competition, for example, by substantially limiting consumer choice or increasing industry concentration. DOE is publishing the Attorney General's determination letter at the end of this notice. In light of the Attorney General's written finding, DOE has no independent basis to come to a different conclusion than the DOJ with regard to Aero-Tech's request for a small business exemption, and, therefore, DOE cannot make a finding that a failure to allow an exemption to Aero-Tech would result in a lessening of competition.

Signed in Washington, DC, on January 17, 2019

Daniel R Simmons,
Assistant Secretary,
Energy Efficiency and Renewable Energy.



U.S. DEPARTMENT OF JUSTICE
Antitrust Division

MAKAN DELRAHIM
Assistant Attorney General

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December 15, 2018

Daniel Cohen
Assistant General Counsel
for Legislation, Regulation and Energy Efficiency
U.S. Department of Energy
1000 Independence Ave.,
SW Washington, DC 20585

Dear Assistant General Counsel Cohen:

I am responding to your October 16, 2018 letter seeking the views of the Attorney General about the potential impact on competition of Aero-Tech Light Bulb Co.'s application for a small-business exemption from energy conservation standards for rough service lamps.

Your request was submitted in accordance with Section 6295(t) of the Energy Policy and Conservation Act of 1975 (EPCA), as amended. This Section provides that the Department of Energy may not grant a small-business exemption from an energy conservation standard until it has obtained the written views of the Attorney General concerning whether competition would be lessened if the Department of Energy does not grant an applicant's requested exemption. 42 U.S.C. § 6295(t)(2). The Attorney General's responsibility for responding to requests from other departments about the effect of any action, program or practice upon the maintenance and preservation of competition has been delegated to the Assistant Attorney General for the Antitrust Division in 28 C.F.R. § 0.40(g).

In conducting its analysis, the Antitrust Division applies the standard set forth in 42 U.S.C. § 6295(t)(2), and examines whether failure to grant a small-business exemption would likely result in a lessening of competition, for example,

by substantially limiting consumer choice or increasing industry concentration. A lessening of competition could result in higher prices to consumers.

We have reviewed Aero-Tech's notice of application for a small-business exemption contained in 83 Fed. Reg. 51931, October 15, 2018. We have also spoken with industry representatives and reviewed supplementary information submitted to the Department of Energy by industry representatives. Based on this review, our conclusion

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is that failure to grant Aero-Tech's application for a small-business exemption for rough service lamps would likely not result in a lessening of competition.

Sincerely,


Makan Delrahim

Case # 2018-001
Decision and Order

I. Background and Authority

The Energy Policy and Conservation Act of 1975 (EPCA),¹ Public Law 94-163 (42 U.S.C. 6291–6317, as codified), among other things, authorizes the U.S. Department of Energy (DOE) to establish energy conservation standards for certain consumer products and industrial equipment. Title III, Part B² of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency for certain types of consumer products. These products include rough service lamps, the focus of this document. (42 U.S.C. 6295(l)(4)(A))

On December 26, 2017, DOE issued a final rule codifying at 10 CFR 430.32(bb) statutory backstop requirements applicable to rough service lamps and vibration service lamps. Prior to the rule, these backstop requirements were triggered as a result of rough and vibration service lamps exceeding a previously announced sales threshold and in the absence of any other energy conservation regulation issued by DOE for these lamps. In particular, the final rule placed in the Code of Federal Regulations a statutorily established 40-watt maximum energy use and packaging limitation for rough and vibration service lamps manufactured on or after January 25, 2018. DOE subsequently published an Enforcement Policy Statement announcing a May 1, 2018 compliance date for the rule.³ For rough service lamps, the statute requires the lamps to: (1) Have a shatter-proof coating or equivalent technology that complies with NSF/ANSI 51 and is designed to contain the

¹ All references to EPCA in this document refer to the statute as amended through the EPS Improvement Act of 2017, Public Law 115-115 (January 12, 2018).

² For editorial reasons, upon codification in the U.S. Code, Part B was redesignated as Part A.

³ DOE's Enforcement Policy Statement can be accessed here:

<https://www.energy.gov/sites/prod/files/2018/02/f48/Enforcement%20Policy%20-%202018%20VSL%20RSL.pdf>

glass if the glass envelope of the lamp is broken and to provide effective containment over the life of the lamp; (2) have a maximum 40-watt limitation; and (3) be sold at retail only in a package containing one lamp. (42 U.S.C. 6295(l)(4)(D)(ii))

Under 42 U.S.C. 6295(t), DOE may grant to a manufacturer a temporary exemption from an applicable energy conservation standard if DOE finds that the annual gross revenues of such manufacturer from all its operations (including the manufacture and sale of covered products) does not exceed \$8,000,000 for the 12-month period preceding the date of the application. In making this finding, DOE must account for the annual gross revenues of any other person who controls, is controlled by, or is under common control with, such manufacturer (referred to herein as a “small business exemption”). (42 U.S.C. 6295(t)(1)) The Secretary of Energy (Secretary) may not grant a small business exemption with respect to any type (or class) of covered product subject to an energy conservation standard unless the Secretary finds, after obtaining the written views of the Attorney General, that a failure to allow an exemption would likely result in a lessening of competition. (42 U.S.C. 6295(t)(2)) *See also*, subpart E of 10 CFR part 430. A notice of the decision of the Secretary must be published in the *Federal Register* along with the reason for denying or granting the application. 10 CFR 430.56(c)

II. Application for Exemption

On May 23, 2018, Aero-Tech Light Bulb Co. (Aero-Tech) submitted an application for a small business exemption pursuant to 42 U.S.C. 6295(t) and Subpart E of 10 CFR part 430, requesting an exemption from the DOE rough service lamps energy conservation standards found in 10 CFR 430.32(bb). Specifically, Aero-Tech requested an exemption from compliance with the standards until January 25, 2020. The application indicated that Aero-Tech is an importer and distributor of rough service light bulbs. In its application, Aero-Tech asked for an exemption from the standards on the basis of its status as a small

business. According to Aero-Tech, failure to receive a small business exemption would likely result in a lessening of competition in the market for lighting companies. In its application, Aero-Tech stated that, failure to grant an exemption would mean that Aero-Tech would lose 70% of its business and have to close its doors.

On October 15, 2018, DOE published a notice announcing its receipt of the application for exemption and solicited comments from interested parties. 83 FR 51931. In accordance with its regulations, DOE also transmitted Aero-Tech's application for exemption to the Attorney General along with: (a) A statement of the facts and of the reasons for the exemption, and (b) copies of all documents submitted. 10 CFR 430.54. DOE received one comment submitted by the National Electrical Manufacturers Association (NEMA) which provided data and supporting factual information relating to rough service lamp sales.⁴ In its comments, NEMA provided the names of nine NEMA manufacturers and two non-member companies that sell rough service lamps. While NEMA did not take a position on the merits of Aero-Tech's application, NEMA's comments indicated that the demand for rough service lamps is decreasing as customers are migrating to light-emitting diode (LED) light bulbs for rough service applications at higher light output levels.

⁴ NEMA's comment can be accessed at: <https://www.regulations.gov/document?D=EERE-2018-BT-PET-0016-0002>

III. Consultation with Other Agencies

Per 42 U.S.C. 6295(t)(2), DOE obtained the written views of the Attorney General concerning Aero-Tech's application for exemption. Under this statutory provision, DOE may only grant a small business exemption if it has consulted with the Attorney General and finds

that a lessening of competition would likely result. In its assessment letter responding to DOE, the Department of Justice (DOJ) concluded that failure to grant Aero-Tech's application for a small business exemption for rough service lamps would likely not result in a lessening of competition. DOJ made this determination after reviewing Aero-Tech's application, as well as speaking with industry representatives and reviewing the supplementary information submitted to DOE by industry representatives. As part of its analysis, DOJ noted that it applies the standard set forth in 42 U.S.C. 6295(t)(2), and examines whether failure to grant a small business exemption would likely result in a lessening of competition, for example, by substantially limiting consumer choice or increasing industry concentration.

IV. Order

DOE has no independent basis to come to a different conclusion than the DOJ with regard to Aero-Tech's request for a small business exemption. Thus, DOE does not find that Aero-Tech has demonstrated that a failure to allow the exemption would result in a lessening of competition, as required under 42 U.S.C. 6295(t)(2). It is ORDERED that the application for a small business exemption submitted on May 23, 2018 by Aero-Tech Light Bulb Co. is denied.

Signed in Washington, DC, on January 17, 2019

Daniel R Simmons
Assistant Secretary
Energy Efficiency and Renewable Energy

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